Supreme Court, U.S.
FILED
APR 8 1993

No. 92-1493

In The

Supreme Court of the United States

October Term, 1992

ALEX STEINBERGH AND R. STANLEY BOWDEN, TRUSTEES OF 16 CHAUNCY TRUST,

Petitioners,

v.

CITY OF CAMBRIDGE AND RENT CONTROL BOARD OF CAMBRIDGE,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Judicial Court Of Massachusetts

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Supreme Judicial Court of Massachusetts was correct in finding on the basis of substantial evidence in the record before it, that a municipal ordinance substantially advanced a legitimate state interest, and thus was not a regulatory taking of property?

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CITY OF CAMBRIDGE AND RENT CONTROL BOARD OF CAMBRIDGE,

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On Petition For A Writ Of Certiorari To The Supreme Judicial Court Of Massachusetts

RESPONDENTS' BRIEF IN OPPOSITION

Respondents City of Cambridge ("the City") and Rent Control Board of Cambridge ("the Board") respectfully request that this Court deny the Petition by Alex Steinbergh and R. Stanley Bowden, Trustees of 16 Chauncy Trust, ("the Petitioners") for a Writ of Certiorari.

CONSTITUTIONAL, STATUTORY AND ORDINANCE PROVISIONS INVOLVED

The Petitioners have not set forth all of the relevant portions of the governing Cambridge Rent Control Enabling Act ("the Act") as enacted by the Massachusetts

legislature and the Cambridge Removal Permit Ordinance ("the Ordinance") in their Petition.[1] In particular, the Petitioners have omitted the preamble to the Act setting forth the purposes of the Act (see footnote 3 below) as well as § 7(a) of the Act (the only portion of the Act explicitly discussed by the Supreme Judicial Court in its decision below) which sets forth the procedure for seeking rent adjustments in order to obtain "a fair net operating income". The Petitioners also have omitted the section of the Ordinance setting forth the legislative purposes in enacting it, and the Ordinance provisions setting forth the factors to be considered in deciding whether to issue a removal permit.[2]

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[1] Petitioners' Appendix C, which sets forth a portion of the Act, does not indicate what portions of it are deleted and often does not indicate the fact that portions have been deleted at all. Portions of the Ordinance are cited in the Petition.

[2] Section 1(a) of the Ordinance provides:

Declaration of Emergency

A serious public emergency continues to exist in the City of Cambridge with respect to the housing of a substantial number of its citizens, as declared by Chapter 36 of the Acts of 1976, for the reasons stated in the Act. The emergency has worsened since 1976 because of the removal of a substantial number of rental housing units from the market, by condominium conversion, demolition, and other causes. As a result, more than 2,000 or over 10 percent of the controlled rental units in the city have been removed from the housing market since 1970, and the vacancy rate has fallen below one percent. In order to carry out the purposes of the Act, and to continue to provide a sufficient supply of decent, affordable rental housing accommodations especially for families of low and moderate income and for elderly people on

STATEMENT OF THE CASE

A. FACTUAL BACKGROUND

In order to regulate a volatile residential rental market and to enable rental housing to be affordable to low and moderate income people, rent control has been in effect in Cambridge since 1970. Since 1976, it has been in force pursuant to Chapter 36 of the Massachusetts Acts of 1976, the Rent Control Enabling Act ("the Act").

Because the basic rent control law did not prevent the loss of many units, Cambridge enacted the Removal Permit Ordinance ("the Ordinance") in 1979 to deal with a serious public emergency – the conversion of substantial numbers of rent controlled units in Cambridge into condominiums, and their consequent removal from the rent controlled housing market. (See footnote 2.) These events exacerbated the shortage of affordable rental housing in Cambridge, the protection of which was the objective of the Act. (Pet. App. C at 1-14.)[3] The Ordinance established

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> fixed incomes, it is necessary for the Cambridge City Council, in the exercise of its powers under section 6 of the Home Rule Amendment and under section 5(c) of the Act, to regulate the removal of controlled rental housing units from the market.

[3] As pointed out above, the Petitioners' Appendix C omits important provisions of the Act, including those critical provisions setting forth the purposes of the Act, which provide as follows:

> Whereas, the City of Cambridge now desires and intends to continue its rent and eviction control program beyond the expiration of Chapter eight hundred forty-two of the Acts of 1970, as amended; and Whereas, the deferred operation of this act would

a regulatory system, under which rent controlled units could not be removed from rental use without a permit from the Rent Control Board. (The original provisions of the Ordinance are not at issue herein.)

The Ordinance was initially effective. Subsequently, however, one practice not prohibited by the original Ordinance became a vehicle for widespread evasion of the Ordinance and the resultant continued loss of rent controlled units. Under the original Ordinance, the sale of individual condominium units in a building to "investors" who ostensibly would not occupy those units was not regulated. *See* Report of the Cambridge City Council Committee on Rent Control, May 28, 1981.[4] That Report found that despite the Ordinance, large numbers of rent-controlled apartments continued to leave the market.

Based upon testimony at its public hearing, Rent Control Board records, personal observations and press reports, "the Committee [found] that a substantial number of violations of the current ordinance have been and are occurring, perhaps as many as several hundred to date." The Committee considered how such illegal

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> tend to defeat its purpose which is, in part, to alleviate certain effects of the severe shortage of rental housing in the City of Cambridge, which shortage has caused a serious emergency detrimental to the public peace, health, safety and convenience therefore, this act is hereby declared to be an emergency law, necessary for the immediate preservation of the public peace, health, safety and convenience.

[4] The Report may be found in Appendix A attached hereto. It is referred to at length by the court in *Steinbergh II, supra*, 413 Mass. at 746-747 (Pet. App. A at 30-32).

removals might be prevented, and found it difficult to do so under the Ordinance as it then stood. Therefore, the Committee proposed that the City amend the Ordinance, to add a new section c1/2, which would attempt to prevent the illegal removals by regulating the initial sale of the individual condominium unit by the building owner.

As a result, the City Council in 1981 amended the Ordinance to add section c1/2, requiring removal permits for sales of individual rent controlled condominium units, and thus eliminating for the future the evasions found by the Report to be occurring. Section c1/2 – which is at issue herein – did *not* require permits before a landlord sold his *entire* interest in a building. Thus, section c1/2 operated in effect as a "subdivision control law", requiring regulatory approval whenever an ownership interest in a building was to be subdivided. Under section c1/2, building owners such as the Petitioners have at all times had the right to sell what they purchased – a building containing rental units.

The Petitioners purchased the 16 Chauncy Street property more than five years after section c1/2 was enacted, knowing it was in effect and that 16 Chauncy Street, as a rent controlled building, was subject to it.

After purchasing the property, and because they wished to sell the individual units in their building as condominiums, the Petitioners applied to the Board for removal permits to permit them to do so, as section c1/2 required. The Board refused the permits, and the Petitioners appealed to the state courts. They argued both that section c1/2 of the Ordinance, under which the Board

had acted, was in excess of the statutory authority of the Board under state law and that it was unconstitutional.

In *Steinbergh v. Rent Control Board of Cambridge*, 406 Mass. 147, 148 (1989) (Pet. App. B at 4), ("*Steinbergh I*"), the Supreme Judicial Court of Massachusetts found in favor of the Petitioners on the first ground, holding that when it adopted section c1/2, the City Council of Cambridge had exceeded the implied authority conferred on it as a municipality by the Rent Control Enabling Act because section c1/2 was not essential to the purposes of the Act. Hence, the court concluded that section c1/2 was invalid under state law. The court found it unnecessary to decide if section c1/2 was unconstitutional.[5]

B. PROCEDURAL HISTORY

After the decision in *Steinbergh I*, the Petitioners brought a second action in the Massachusetts superior court against the City and the Board, this time seeking damages for losses allegedly sustained by them during the interval between the Board's denial of their application for removal permits on September 14, 1987 and the decision in *Steinbergh I* on November 20, 1989. The Petitioners did not assert that the enforcement of section c1/2 against them in that interval had deprived them of all economically viable use of the property. Nor could they: the trial court found that the Petitioners had continued to

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[5] Subsequent to the Supreme Judicial Court's decision in *Steinbergh I*, the Legislature enacted Chapter 52 of the Acts of 1990, granting the City the express power and reenacting section c1/2 as state law. (A copy of Chapter 52 may be found in Appendix B attached hereto.)

collect rent on the units during the interval, realizing a gross rental income of $803,970, and a net income of $120,000, during the pendency of *Steinbergh I*.[6] The Petitioners instead complained only that they had sustained losses by virtue of their inability to sell individual condominium units during the interval. They based this claim for damages on the assertion that section c1/2 was unconstitutional.

Upon cross motions for summary judgment, the superior court entered summary judgment for the City and the Board, concluding that there had been no unlawful taking. After accepting the case upon the Petitioners' application for direct appellate review, the Supreme Judicial Court of Massachusetts in *Steinbergh v. Cambridge*, 413 Mass. 736 (1992) (Pet. App. A), ("*Steinbergh II*") affirmed.[7]

The court in *Steinbergh II* noted that "the [Petitioners'] principal contention is that the City's application to their property of the challenged ordinance provision constituted an uncompensated, temporary regulatory taking of property." *Id.* at 738 (Pet. App. A at 4).

Finding *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), to be inapplicable since there was no issue of physical occupation raised by section c1/2's regulation of unit sales, and finding *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886 (1992), to be inapplicable

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[6] It is remarkable that in the nearly sixty pages of the Petition, there is no mention of this.

[7] The trial court had rejected the City's and the Board's argument that the Petitioners' claims were barred by the doctrine of issue preclusion; the Supreme Judicial Court affirmed this conclusion as well.

because section c1/2 had not deprived the Petitioners of all economically beneficial or productive use of their property, *id.* at 741 (Pet. App. A at 14), the court next turned to the ad hoc test for regulatory takings of *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978). *Id.* at 742 (Pet. App. A at 13).

Assuming for purposes of this case that the principles of *Penn Central* applied in a case of an alleged temporary taking, the court concluded that there was no taking because the sales restrictions imposed by section c1/2 were found to substantially advance legitimate state interests. *Id.* at 744 (Pet. App. A at 23-24). The court began its analysis of this ground by noting that the Petitioners did not assert that the control of rents was not a legitimate state interest, but only that the sales restrictions imposed by section c1/2 did not substantially advance that interest. *Id.* at 744-745 (Pet. App. A at 24-25).

The court pointed out that the Petitioners "rely heavily" on its prior opinion in *Steinbergh I*, striking down section c1/2's regulation of unit sales as beyond Cambridge's municipal power under state law. *Id.* at 745 (Pet. App. A at 28). The court noted that the state standard applied in the prior case – whether the challenged provision was "necessary" to the operation of the Act – was different from and higher than the federal constitutional standard. *Id.* at 745-746 (Pet. App. A at 28-29).[8]

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[8] Under Massachusetts law, to come within implied powers, an ordinance must "be '*essential* and not merely convenient to the implementation of express powers conferred by the statute.' " *Steinbergh I*, 406 Mass. at 154-155 (Pet. App. B at 23) (emphasis supplied), quoting *Greater Boston Real Estate Bd. v. Boston*, 397 Mass. 870, 877 (1986).

Hence, a provision that was not essential and thus beyond local power under state law could "substantially advance a legitimate state interest" and be constitutional. *Id.* at 746 (Pet. App. A at 28-29).

The court then reviewed the legislative record and found that section c1/2 satisfied the constitutional test. *Id.* (Pet. App. A at 29-30). It referred to the 1981 City Council Report discussed above concerning the frequency of evasion of the Ordinance by means of sales to "investors," and concluded that "[t]he elimination, through the adoption of an economically feasible restriction, of conditions that created a substantial risk of difficult-to-discover violations of an aspect of the rent control law substantially advanced the operation of the Cambridge rent control law." *Id.* at 747 (Pet. App. A at 30-32).

The court in *Steinbergh I* had stated in dicta that, for purposes of determining whether section c1/2 was within the implied or necessary power of the City to adopt it, section c1/2 had "minimal" logical connection to regulating rents. *Steinbergh I*, 406 Mass. at 155 (Pet. App. B at 23-24). In *Steinbergh II*, however, the court made it clear that it had not been correct in so stating. In footnote 12 of its decision in *Steinbergh II*, the Supreme Judicial Court acknowledged:

> After *Steinbergh I* had been decided, by St. 1990, c. 52, § 2, in language substantially identical to the challenged regulation, the Legislature enacted a restriction on the sale of individual units by an owner of a Cambridge building with condominium units. In § 1 of that act, the General Court made legislative findings to the effect that (a) it was necessary to regulate the removal

> of controlled rental units from the market, (b) the city's existing powers to regulate such removals had proven inadequate, (c) since *Steinbergh I*, "hundreds of individual condominium units have been transferred or sold thereby creating a substantial risk of the removal of controlled rental housing units from the rental market," and "(d) [i]n order to regulate such removals effectively, it is necessary to regulate the sale of condominium units by the owners of rent controlled buildings, for the reasons stated in the Report of the Cambridge City Council Committee on Rent Control dated May 28, 1981."
>
> Although these findings made after the adoption of the challenged ordinance provision are not supportive legislative history, they do justify a judicial conclusion that the ordinance substantially advanced the operation of the Cambridge rent control law. *These findings also make no longer correct the dicta in Steinbergh I that the challenged regulation had "minimal" logical connection to preserving Cambridge's rental housing stock.* See *Steinbergh v. Rent Control Bd. of Cambridge*, 406 Mass. 147, 155 (1989). (Emphasis supplied.) 413 Mass. at 747 n.12 (Pet. App. A at 32-33).

Thus, not only did the Court in *Steinbergh II* expressly reject its dicta from *Steinbergh I, but* the court in *Steinbergh II* expressly concluded that the "challenged ordinance substantially advance(d)", 413 Mass. at 746 (Pet. App. A at 29), the "legitimate state interest" of rent control in the City. *Id.* at 744, 746 (Pet. App. A at 24, 29).

The provisions of the Ordinance concerning the regulation of vacancy and owner occupancy, which Petitioners

have attempted to inject into this case, are not discussed in *Steinbergh II*; they were not at issue in the case and thus were never raised to nor passed upon by the court below. As the procedural history set forth by the Petitioners (Pet. at 14) aptly demonstrates, the *only* provision challenged and at issue in *Steinbergh I* and *Steinbergh II* and, therefore, properly before this Court, is the provision of section c1/2 requiring that an owner of a rent controlled building sell his entire interest unless he obtains a removal permit, permitting the sale of individual units.[9]

REASONS FOR DENYING THE WRIT

In maintaining that the Massachusetts court erred in *Steinbergh II*, Petitioners ignore the facts as determined by the court in *Steinbergh II*, improperly equate the court's not "necessary" finding in *Steinbergh I* with the issue of whether section c1/2 is "substantially related" to a legitimate state interest; improperly raise issues neither raised nor resolved below; misstate the level of scrutiny being applied by the court in *Steinbergh II*; misconstrue the purposes which section c1/2 was found by the *Steinbergh II* court to serve; ignore the fact that the decision of the court that there was no taking is proper on independent grounds; and allege a conflict among the courts which does not exist.

[9] This is made clear by the state court's decisions. See, e.g., *Steinbergh II*, 413 Mass. at 737 and 738 (Pet. App. A at 3 and 4).

A. THE PETITIONERS IMPROPERLY RELY HEAVILY ON LANGUAGE OF THE MASSACHUSETTS SUPREME JUDICIAL COURT IN *STEINBERGH I* EVEN THOUGH THAT COURT IN *STEINBERGH II* CONCLUDED THAT THE LANGUAGE WAS NO LONGER CORRECT

In arguing that section c1/2 does not "substantially advance" the legitimate interest of rent control, the Petitioners rely heavily on certain language of the Supreme Judicial Court in *Steinbergh I*, in which that court found that section c1/2 was "not necessary" to the operation of the Cambridge Rent Control Act.

The initial and foremost fallacy of the Petitioners' argument to this Court is the fact that the language of *Steinbergh I* upon which they so "heavily" rely, *Steinbergh II*, 413 Mass. at 745 (Pet. App. A at 28), (i) was not binding upon the court in *Steinbergh II*, and indeed was directly rejected by it in that decision; and (ii) in any event, was not addressed to the issue of whether section c 1/2 was constitutional, but to the completely distinct question whether it was within Cambridge's power under state law, a test requiring that it be shown to be "essential". Thus, the Petitioners' argument is rendered baseless by the re-examination of section c1/2 by the court in *Steinbergh II* and that court's explanation of its prior holding.

In their argument, the Petitioners improperly ignore the fact that the court in *Steinbergh II* completely re-examined the legislative findings and purposes which lay behind section c1/2's enactment. As discussed above, based upon that review the court expressly concluded that the legislative history "make[s] no longer correct the dicta in *Steinbergh I* that the challenged regulation had

'minimal' logical connection to preserving Cambridge's rental housing stock." 413 Mass. at 747 n.12 (Pet. App. A at 33). The court thus found the factual basis upon which it previously had concluded section c1/2 to be only minimally related to the legitimate purposes of the Rent Control Act, and upon which the court had earlier concluded it was not necessary, no longer correct.[10]

In *Steinbergh II*, the court analyzed the legislative record and findings and found that they supported the conclusion that "developer sales are tantamount to removal from the rental market." 413 Mass. at 746 (Pet. App. A at 31). Rejecting the "minimal" logical connection conclusion of *Steinbergh I*, the court in *Steinbergh II* expressly concluded that section c1/2 substantially advanced the purposes of the Act in preserving the availability of affordable rental stock. *Id.* (Pet. App. A at 31-32). Preservation of the affordable rental housing stock is a legitimate state purpose. *Flynn v. Cambridge*, 383 Mass. 152, 157 (1981); *Pennell v. City of San Jose*, 485 U.S. 1, 11 (1988).

Not only do the Petitioners ignore *Steinbergh II*'s express acknowledgement that *Steinbergh I*'s conclusion about the lack of nexus between the Act and section c1/2

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[10] Nowhere in the Petitioners' argument do they acknowledge the *Steinbergh II* court's rejection of the *Steinbergh I* dicta about minimal connection. However, this rejection goes to the very heart of the Petitioners' argument. Indeed, one must question the propriety of the Petitioners' use of the *Steinbergh I* minimal connection language without bringing *Steinbergh II*'s express rejection of it to this Court's attention.

of the Ordinance was no longer correct; but the Petitioners improperly equate the Massachusetts "necessity" test applied in *Steinbergh I* with respect to whether the ordinance was "essential", with the "substantially advance legitimate state interest" test properly applied by the court to the federal constitutional takings issue in *Steinbergh II*.

In Massachusetts, if a municipality asserts implied powers to pass a local law that is not essential to accomplish the purposes of some existing state law, then the local law is invalid and the legislature can, if it deems it appropriate, expressly grant the authority to the municipality or pass the law itself. As the court in *Steinbergh II* recognized, the issue of implied powers is a totally different one from whether the Constitution forbids a certain way of implementing a legitimate state purpose.

As the *Steinbergh II* court also made clear, the state law test applied in *Steinbergh I* was substantially more stringent than the federal constitutional test. The court in *Steinbergh II* explained:

> "There [*Steinbergh I*] we were concerned with whether the regulation was necessary to the operation of the rent control law, in which case the city would have had implied authority to adopt it. *Steinbergh I, supra* at 151 . . . We concluded that the ordinance provision . . . was not necessary for that purpose. Thus the city had no implied authority to adopt it. In the case before us, the standard is not one of necessity. The test is rather whether the regulation advanced the objects of rent control and did so substantially.

413 Mass. at 745-746 (Pet. App. A at 31-32).

In *Steinbergh II*, therefore, the court made the very clear distinction between the federal constitutional issue before it and the very different issue before it in *Steinbergh I*. Hence, the Petitioners' reliance on *Steinbergh I* in asserting that section c1/2 is unconstitutional is erroneous and may not result in a grant of certiorari by this Court.

B. SINCE THE PETITIONERS FAILED TO RAISE ISSUES REGARDING THE ORDINANCE'S PROVISIONS REGULATING VACANCY WITHOUT GOOD CAUSE AND LIMITING OWNER OCCUPANCY WITHOUT A REMOVAL PERMIT IN THE PROCEEDINGS BELOW, AND SINCE THESE ISSUES WERE NOT RESOLVED BY THE COURTS BELOW, THESE ISSUES ARE NOT PROPERLY BEFORE THIS COURT

"Ordinarily, this Court does not decide questions not raised or resolved in the lower Court." *Youakim v. Miller*, 425 U.S. 231, 234 (1976). "Only in exceptional cases will this Court review a question not raised in the case below." *Lawn v. United States*, 355 U.S. 339, 362 n.16 (1958), citing *Duignan v. United States*, 274 U.S. 195, 200 (1976). A claim not raised in the court below "is not properly before [this Court]." *Delta Airlines, Inc. v. August*, 450 U.S. 346, 362 (1981). This case represents no exception to this basic rule.

The only provision challenged by the Petitioners in *Steinbergh I* or *Steinbergh II* was the requirement in section c1/2 that an owner of a rent controlled building obtain a removal permit from the Board before selling individual units. It is thus that provision and that provision alone which the court in *Steinbergh II* properly concluded was

substantially related to the purpose of the Act in preserving the affordable rental housing stock in the City.

It is important to keep in mind what is not presented by this case. The issue is not the wisdom of rent control as a state legislative policy. It is not whether rent control is a legitimate state interest, which has repeatedly and recently been decided by this Court. *Yee v. City of Escondido,* 112 S.Ct. 1522 (1992). Nor does this case present the issue of the legitimacy of portions of the Ordinance which pertain to limiting owner occupancy without removal permits or regulating vacancy without good cause; these issues were never raised to, nor decided by, the court below.[11] These provisions, as demonstrated by the Petitioners' own statement of procedural history and that of the court in *Steinbergh II,* are *not* relevant to the issue decided below, namely the validity of the sales restriction of section c1/2 challenged by the Petitioners. The only issue presented by the Petitioners is the narrow issue of whether the state court correctly concluded that there is no taking because section c1/2's regulation of individual unit sales substantially advanced a legitimate state purpose.

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[11] The Petitioners rely on these provisions to argue that the Ordinance constituted a physical taking. However, the lack of any physical occupation under section c1/2 itself is evident here when it is recognized that that provision does nothing more than regulate sales; a sales regulation cannot fall within the physical occupation doctrine. See *Andrus v. Allard,* 444 U.S. 51, 65 (1979) (holding that "[t]he regulations challenged here do not compel the surrender of the artifacts, and there is no physical invasion or restraint upon them. Rather, a significant restriction has been imposed on one means of disposing of the artifacts [i.e., their sale].")

It should also be noted that the Petitioners appear to argue for the first time to this Court that the mere holding of the court in *Steinbergh I* that section c1/2 was not itself authorized under state law, and without more, mandates a conclusion of a temporary regulatory taking. (Pet. at 29, 34-36). Not only did the Petitioners fail to raise such argument below,[12] but as the court in *Steinbergh II* explained: "The plaintiffs make no reasoned argument that, simply because a municipal regulation is not authorized by law, there is a compensable temporary taking of property . . . " 413 Mass. at 744 (Pet. App. at 23). The fact that the City was not authorized to enact section c1/2 as an implied power does not compel a conclusion that the enactment was, without more, a compensable taking.

C. THE MASSACHUSETTS SUPREME JUDICIAL COURT APPLIED THE CORRECT LEGAL STANDARD IN DECIDING THAT THERE WAS NO REGULATORY TAKING

The court in *Steinbergh II* applied the correct legal standard in concluding that "the challenged ordinance substantially advanced the purpose of rent control", *id.* at 746 (Pet. App. A at 29), by "preserving Cambridge's rental housing stock". *Id.* at 747 n.12 (Pet. App. A at 33). According to the court in *Steinbergh II*, the "incremental enforcement advantage of the regulation", *id.* at 747 (Pet.

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[12] As the Court in *Steinbergh II* explained: "The plaintiffs, we think rightly, do not contend that a local land use regulation that is ultra vires cannot, as a matter of law, be viewed for takings purposes as substantially advancing a state interest." 413 Mass. at 746 n.10 (Pet. App. A at 29).

App. A at 33), was the "preserving [of] Cambridge's rental housing stock", *id.* at 747 n.12 (Pet. App. A at 33), or prohibiting "removal from the rental market." *Id.* at 746 (Pet. App. A at 31). The so-called "incremental enforcement advantage" identified in *Steinbergh I* was found by the court in *Steinbergh II* to be more than "minimal[ly] connected to the preservation of Cambridge's rental housing stock", 413 Mass. at 747 n.12 (Pet. App. A at 33); it was found to substantially advance the purposes of the Act. *Id.* at 747 (Pet. App. A at 32).

The court in *Steinbergh II* concluded that:

> The requirement that a regulation substantially advance the state interest *may* express a higher standard at least in certain circumstances than the rational basis test commonly applicable in deciding whether an exercise of the police power satisfies due process or equal protection requirements. [*Nollan v. California Coastal Commission*, 483 U.S. 825 (1987)] at 834 n.3. It *may* be that the degree of substantiality required varies depending on the character of the state's interest in relation to the reduction that the local regulation causes in the value and quality of the affected property. See *id.* at 841; L. Tribe, American Constitutional Law §9-4, at 599 n.20 (2d ed. 1988). In the case before us, unlike the *Nollan* case, the city has not attempted to acquire an interest in land at no cost to the public, nor has Cambridge sought to regulate the plaintiffs' property for a reason that has no connection whatever with the reason for rent control. 413

Mass. at 745 (Pet. App. A at 25-28) (emphasis supplied).[13]

The standard applied in *Steinbergh II* thus was clearly stated to be whether the ordinance "substantially advance[d] the regulation of rents in the city." *Id.* at 745 (Pet. App. A at 28). This standard was correct under this Court's decision in *Nollan*.

In *Nollan* this Court struck down a requirement that a property owner grant an easement across his beachfront property as a condition of obtaining a building permit. Finding that there was not a sufficient nexus between the building permit and the easement, which caused a physical occupation, this Court concluded that the easement requirement did not "substantially advance a legitimate state interest."

In *Steinbergh II*, the Supreme Judicial Court applied that standard, but found a sufficient connection between the challenged provision – section c½ – and the legitimate state interest in rent control and removal regulation. Hence, it found that there was no taking. Its conclusion was based on a close review of the record before it, and is amply supported by that record; this Court should not review the matter.

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[13] The court acknowledged the Court of Appeals for the Ninth Circuit's decision in " . . . *Commercial Builders of N. Cal. v. Sacramento*, 941 F.2d 872, 874 (9th Cir. 1991), cert. denied, 112 S.Ct. 1997 (1992) (rejecting argument that *Nollan* materially changes level of scrutiny; no Circuit Court of Appeals has interpreted *Nollan* 'as changing the level of scrutiny to be applied to regulations that do not constitute a physical encroachment on land')." 413 Mass. at 745 n.8 (Pet. App. A at 26).

As discussed above, the court reviewed the City Council Report which was the basis for the enactment of section c1/2. That Report had documented a pattern of evasion of the prior Ordinance, and hence a continuing loss of units from the rent control system, which resulted from buyers taking advantage of the original Ordinance's allowance of "investor" purchase of individual units.

Surveying this evidence, the court had ample basis to conclude that the City Council's proposed remedy, the requirement that a permit be obtained before individual units could be sold, was constitutional. Even though that remedy had not been "essential" to preserving rent control, under the strict test to determine whether Cambridge had the implied power to enact it under state law, that remedy bore a "substantial relation" to the preservation of rent control and the rental housing stock.

The court's decision is clearly correct, and well within the limits of what *Nollan* permits. In *Nollan*, the challenged requirement – that an easement along the property owner's beachfront be granted – was found to be a physical intrusion and further to be totally unrelated to the building of a house on the property. Here, it is clear, section c1/2, involves no physical intrusion. Moreover, it would eliminate a series of evasive schemes which were threatening to remove substantial numbers of units from the rental housing stock, and thus to undermine the rent control law's basic protections.

In sum, section c1/2 substantially advanced the Act's legitimate governmental interest in preserving the affordable rental housing stock in the City.

D. EVEN IF THE COURT APPLIED AN ERRONEOUS STANDARD (WHICH IT DID NOT) OR ERRED (WHICH IT DID NOT) IN DECIDING THAT SECTION C½ SUBSTANTIALLY ADVANCED A LEGITIMATE STATE INTEREST, NO CONSTITUTIONAL TAKING OCCURRED HERE ON INDEPENDENT GROUNDS

The Petitioners purchased the 16 Chauncy Street property more than five years after section c½ was enacted and thus the ordinance could not have interfered with their reasonable investment-backed expectations. *Steinbergh II* and cases cited, 413 Mass. at 742 (Pet. App. A at 18). The Petitioners also purchased the property knowing about the application of the ordinance to their property. *Id.* and cases cited (Pet. App. A at 18-19). The ordinance did not deny the Petitioners all economically viable use of their property. In fact, they received, not only a fair net operating income, but a profit of $120,000 during the period of the claimed "taking". *Id.* at 739, 741 (Pet. App. A at 8, 14-15).

These bases independently support the Supreme Judicial Court's conclusion and judgment that there was no temporary regulatory taking.

E. SINCE THIS CASE DOES NOT RAISE ANY ISSUE AS TO A CONFLICT BETWEEN LOWER COURTS REGARDING THE APPLICABLE STANDARD IN REGULATORY TAKINGS CASES, THERE IS NO REASON FOR THIS COURT TO GRANT CERTIORARI IN ANY EVENT

Petitioners argue that this Court should grant certiorari because, although the Supreme Judicial Court

applied heightened scrutiny under *Nollan* to this regulatory takings case by stating the test to be whether the regulation substantially advanced a legitimate state interest, other courts have determined that no heightened scrutiny applies in regulatory takings that do not effect a physical occupation. Thus, Petitioners urge that there is a conflict between Massachusetts and other courts with respect to the level of scrutiny under *Nollan* for regulatory takings, which justifies this Court taking this case to review this matter.

First of all, as discussed more fully above, the perceived conflict does *not* exist.

Secondly, to the extent that the Supreme Judicial Court might be said to have applied a standard that required the City to make a greater showing of substantiality than was necessary, the Petitioners were in no way harmed by that benefit to them. A decision by this Court that a less stringent standard would have sufficed will not affect these Petitioners in any way.

Not only is there no issue important enough for this Court's grant of certiorari, but there is no real issue at all.

CONCLUSION

For the reasons stated and authorities cited, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Dated: April 8, 1993

APPENDIX A

CAMBRIDGE CITY COUNCIL

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David E. Sullivan
City Councillor

May 28, 1981

REPORT OF THE COMMITTEE ON RENT CONTROL

To the Honorable, the City Council:

The Committee on Rent Control, to which was referred the proposed ordinance amending the rental housing removal ordinance (see Order No. 3 of May 4, 1981), reports recommending that the attached substitute ordinance ought to pass. (Councillor Crane dissenting with respect to section 2).

The Committee believes that the proposed ordinance which it reports today represents a fair balancing of the legitimate interests of present and future rent-controlled tenants and present and future condominium unit owners. The reported ordinance would:

1. Clarify that the present ordinance exempts condominium units purchased for the first time before August 10, 1979, whether or not they were being used for rental housing on the effective date of the 1979 ordinance. The proposal would also reiterate that once a condominium unit has been legally occupied by its owner, it will never again be subject to the ordinance.

2. Require a removal permit before a condominium developer could sell a rent-controlled apartment. Bona-

fide sales to current tenants who occupied their apartments as such before August 10, 1979 would be exempt from this requirement. The current ordinance requires a permit only before a non-exempt unit owner actually occupies the unit if the last previous occupant was a tenant.

The proposal does not attempt to resolve certain long-range issues, such as the problem of "hybrid" buildings. The Committee believes that these require further discussion, some of which has already begun.

The Referred Proposal

The proposed ordinance referred to the Committee for hearing and report, besides the provision requiring permits for developer sales which the Committee reports in modified form as section 2 of its draft, contains provisions restricting tenant purchases of condominium units and tightening the standards for granting removal permits. As the result of substantial testimony at the May 13 public hearing (see attached summary) and subsequent correspondence opposing these changes, the Committee does not recommend them for adoption.

Background

The rent housing removal ordinance, Cambridge City Code ch. 23, § 1, was first passed by this City Council on August 13, 1979. Ordinance No. 926. The ordinance has been amended three times since: to include certain demolitions (Ordinance No. 929 of March 3, 1980), to exempt non-profit rehabilitation for low- and moderate-income

home ownership (Ordinance No. 932 of April 28, 1980), and to make explicit the coverage of cooperative conversions (Ordinance No. 941 of August 4, 1980).

The removal ordinance forbids any rent-controlled apartment from being removed from the rental market without a permit from the Rent Control Board. Cambridge City Code ch. 23, § 1(c). Removal is defined to include owner-occupancy of a condominium unit if the last previous occupant was a tenant. *Id.* § 1(b)(4)(i). Exempt from regulation are: pre-August 10, 1979 tenants purchasing their own units (§ 1(b)(4)(i); Rent Control Board reg. (13-01(u), (v)); owner-occupants of non-condominium units (§ 1(b)(4); reg. 13-01(W)); condominium unit owner-occupants temporarily renting out their units; and condominium units purchased before August 10, 1979 (§ 1(b)(4)).

The City Council passed the original ordinance in 1979 because it found that condominium conversion, demolition, and other removals of rent-controlled apartments from the market were worsening a serious public emergency in housing. More than 2.000 or over 10 percent of the city's rent-controlled apartments had already been removed. Cambridge City Code ch. 23, § 1(a). In the words of the Supreme Judicial Court:

> immediately prior to passage of the ordinance, conversation of controlled rental housing . . . was sharply reducing the supply of rental housing in Cambridge. . . . Even if the conversion rate did no more than level off, the power . . . to control rents would steadily and irreversibly be transformed into the power to control nothing.

Flynn v. City of Cambridge, 81 Mass. Adv. Sh. 692, 699, 418 N.E.2d 335, 339 (1981).

In the *Flynn* case, the Supreme Judicial Court unanimously upheld the validity of the original ordinance. It must be emphasized that the ordinance was in full effect throughout that litigation, because the Superior Court denied a preliminary injunction on December 21, 1979, and then upheld the ordinance on its merits on May 13, 1980. *Id.* at 693, 418 N.E.2d at 336.

Exempt Unit Owners

Section 1 of the Committee's proposed ordinance exempts condominium units purchased before August 10, 1979, whether or not they were being used for rental housing on the 1979 effective date. The Committee believes this clarification to be helpful in alleviating concerns that the Rent Control Board would interpret the Ordinance to cover such units in view of the *Flynn* case, 81 Mass Adv. Sh. at 700, 418 N.E.2d at 339.

Section 1 of the reported ordinance also restates what the Committee understands to be the law now*: that once a condominium unit owner legally occupies his or her unit, the ordinance will never again apply to that unit.

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* There may be one situation as to which this provision changes the law: when the owner and former legal occupant of a condominium unit, who is now renting it to a tenant, sells to a purchaser who desires to occupy. The Committee wishes to make it clear that even in these circumstances the ordinance will not apply and no removal permit will be necessary.

The Committee wishes to reassure all legitimate condominium unit owners that restrictions on further conversions are in no way aimed at them. In fact, such regulation can only increase the value of their holdings, as the president of the Cambridge Council of Realtors has correctly pointed out. Camb. Chronicle, March 19, 1981, at 10.

Developer Liability

Despite the present ordinance, large numbers of rent-controlled apartments continue to leave the market, according to a recent study of the subject by an MIT student. R. Heller, *The Cambridge Condominium Conversion Ordinance* 20-21 (1981) (unpublished paper on file with Committee). Of course, some of these removals are exempt, mostly because of current tenants purchasing their own apartments.

But the Committee finds that a substantial number of violations of the current ordinance have been and are occurring, perhaps as many as several hundred to date. The Committee bases this finding on repeated testimony at its March 25, 1981 public hearing, Rent Control Board records, personal observations, and press reports. Camb. Chronicle, March 19, 1981, at 1, col. 4; Apr. 23, 1981, at 1, col. 1; Real Paper, April 30, 1981, at 8, col. 1; Harv. Crimson, March 10, 1981, at 3, col. 4; March 14, 1981, at 4, col. 1. Some of these are blatant cases of condominium unit owner-occupancy without the required permit, such as have been alleged at 1572 Massachusetts Avenue, 50 Follen Street, 10 Dana Street, and 285 Harvard Street, among others. Other illegal removals are more sophisticated, involving such sham transactions as taking title to

a unit through a trust or close relative that then "rents" to the beneficial owner at less than arm's length, or purchasing through a previous tenant who "buys" immediately before leaving. See *Cambridge Rent Control Board v. First Highland Development Corp.*, Civil Action No. 81-1226 (Mass. Super., Middlesex April 24, 1981) (granting preliminary injunction by consent against latter scheme). These violations have occurred both before and after the March 12, 1981 Supreme Judicial Court decision.

The Committee also finds that the present ordinance can be enforced against such illegal removals only with considerable difficulty. A violation occurs only when a condominium unit owner actually occupies without a permit. Enforcement thus requires continuous monitoring of each newly-sold unit's occupancy, an intrusive and impossible task, especially under Proposition 2½'s funding constraints. Too much room is left for elaborate evasion schemes of the kind described above. A civil remedy must involve eviction of a unit owner already in occupancy. Most importantly, developers are able to disclaim all responsibility for violations, since the purchasers could have been interested only in an investment. *See* Harv. Crimson, March 10, 1981, at 3, col. 4 (quoting developer as saying of condominium units, "I sold them to people who were aware of the laws. . . . It's not up to me to enforce the law").

The Committee believes that this state of affairs is unacceptable and proposes to end it on July 1. Section 2 of the reported proposal would impose liability on condominium developers for any sale (including an offer or agreement to sell) of a rent-controlled apartment after

that date.* Sales to current tenants would be exempt, and they would merely file a form affidavit with the Rent Control Board to qualify. By requiring that this affidavit recite that such a tenant occupied the apartment before August 10, 1979, the Committee means to ratify Board regulations 13-01(u), (v), construing the present ordinance so as to limit the exemption to those tenants. The Committee means to apply the present considerations for granting removal permits under section 1(d) of the ordinance to decisions about whether to grant permits before unit sales – that is, to presume that such developer sales are tantamount to removal from the rental market, because that is what the evidence shows.**

The following arguments support section 2 of the Committee draft:

1. It does not in any way further limit condominium unit purchases for owner-occupancy, as compared with the present ordinance.

2. It imposes initial liability on developers, who are more likely than purchasers to be aware of the law.

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* This is in essence already the rule for *cooperative* conversions under section 1(b)(4)(iv) of the current ordinance. This rule has proved easily enforcible [sic] – it brought a quick end to the illegal cooperative conversion of 12-16 Ware Street. *Barry v. Hurley*, Civil Action No. 80-5661 (Mass. Super., Middlesex Nov. 10, 1980) (granting preliminary injunction against sales of, or offer to sell, share in cooperative).

** In this connection, the Committee recommends that the Board rescind regulation 46-08, which it believes to be confusing, seldom applied, and contrary in part to section 1(d) which sets forth the exclusive considerations.

3. As such, it protects innocent purchasers against potentially unscrupulous developers.

4. By allowing a court to enjoin illegal sales, offers, and agreements, it provides a meaningful civil remedy short of an order requiring an owner-occupant to vacate.

5. It simplifies and reduces the cost of enforcement by limiting proof of violation to the recording of an initial unit deed after July 1, 1981 without the issuance of either a removal permit or an exemption certificate.

6. For similar reasons, it furnishes future legitimate unit purchasers with a clear documentary record of valid sale and occupancy, and clears future titles on resale.

7. By requiring issuance of an exemption certificate before a developer may make an offer to sell to a current tenant, it prevents harassment of older or poorer tenants (see Camb. Chronicle, April 23, 1981, at 1, col. 1) who may have no desire or ability to buy, while entirely preserving their freedom to do so if they wish.

8. It tends to prevent future fragmented ownership of rental housing in the same building, which interferes with provision of necessary and legally-required services to tenants in an efficient manner.

Against this array of prospective protections for both legitimate condominium unit purchasers and current and future tenants, the Committee is aware of only one substantial opposition argument: the alleged need to provide tax shelters for buyers who are mere investors. *See* Camb. Chronicle, May 14, 1981, at 1, col. 6. To be sure, section 2 of the Committee's recommendation would tend to prevent future developer sales to such investors, because

they would be unlikely to meet the current tests for removal of such apartments from the rent-controlled market.

There are several responses to this argument. First, a large number of new and previously-converted condominium units, not to mention many other suitable investments, are otherwise available to these investors. Second, the Committee is informed that a typical rent-controlled apartment is a sensible investment only as a tax shelter for someone whose annual income exceeds $70,000, because the current rent control formula correctly does not allow financing costs to be recovered from tenants in increased rents. The Committee regards the "needs" of these wealthy individuals under the circumstances as subordinate to responsible actions taken to meet a declared housing emergency, especially since a major cause of the emergency is a bizarre federal tax policy which ironically rewards precisely these investors at the expense of the low-and moderate-income tenants whom the city is striving to protect. *See* Goetze, *The Housing Bubble,* Working Papers, Jan.-Feb., 1981, at 44. Finally, the overwhelming evidence before the Committee causes it to find that most purchases by "investors" wind up sooner or later as violations of the ordinance by one of the schemes described above. In this light, the Committee has no difficulty concluding that continued preservation of the city's stock of decent, affordable rental housing justifies, from both legal and policy perspectives, its broad, prophylactic rule that presumes rent-controlled condominium units to be purchased for owner-occupancy.

There is another, less worthy argument against section 2 of the Committee's proposed ordinance. It is that

better enforcement of the present rules will restrict too much additional condominium conversion. The contention is made in bad faith. It seeks to bring about by nonenforcement of the rules an outcome which ought to result only from changing the rules. The Committee now turns to that outcome, which is vacancy decontrol.

The Threat of Vacancy Decontrol

The real alternative to passage of the Committee's report is not continuing the status quo, but rather vacancy decontrol under one disguise or another.

This city's rent control and conversion control programs seek to protect existing tenants against unfair rents, arbitrary evictions, and destruction of their homes. But they also attempt to safeguard the city's supply of decent, affordable housing for low- and moderate-income people and elderly people on fixed incomes, thus providing for the future diversity of the city's population and the housing needs of future tenants as well. *See* Cambridge Community Development Department, *Condominium Conversions in Cambridge*, 46, 79 (1980) (finding that without government intervention 45 percent of Cambridge apartments in buildings of seven or more units would be converted by 1990, displacing 53 percent of the present tenants, about half of whom would be low-income elderly people).

PROPOSED ORDINANCE

Be it ordained by the City Council of the City of Cambridge as follows:

That Chapter Twenty-Three entitled "Regulations Pertaining to Controlled Rental Housing Units," section 1 entitled "Removal of Controlled Rental Units from Market," as appearing in Ordinance No. 9-5 of October 6, 1980, is hereby amended as follows:

1. In subsection (b)(4), by striking out the period at the end of the concluding paragraph and adding the following: "whether or not the unit was being used for rental housing on August 13, 1979. No condominium unit once legally occupied by the unit owner shall ever again be subject to this section for any reason."

2. By inserting after subsection (c) the following new subsection:

(c½) *Prohibited acts by developers.* After July 1, 1981, no owner of a building for which a condominium master deed has been recorded shall directly or indirectly sell, offer for sale, or agree to sell any controlled rental unit therein, unless the board has granted a removal permit for that unit, or unless the sale or offer is to, or the agreement is with, a current tenant of the unit who holds an exemption certificate. The board shall issue an exemption certificate to any person who files with it an affidavit in a form prescribed by the board, stating that he is a current tenant of the unit, that he occupied it as a tenant before August 10, 1979, and that he intends in good faith to occupy it indefinitely as its owner. No person shall file a false affidavit under this subsection.

APPENDIX B

CAMBRIDGE, CITY OF – CONTROLLED RENTAL UNITS – REMOVAL CHAPTER 52

AN ACT regulating condominium conversion and other removals of controlled rental units in the city of Cambridge

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. The General Court finds and declares that:

(a) In order to meet the serious public emergency that continues to exist in the City of Cambridge with respect to the housing of a substantial number of its citizens, it is necessary to regulate the removal of controlled rental housing units from the market.

(b) The city's existing powers to regulate such removals pursuant to Chapter 36 of the acts of 1976, as amended, have proven inadequate, and many such units continue to be removed from rent control.

(c) Since the November 20, 1989 Steinbergh v. Cambridge Rent Control Board decision, 406 Mass. 147 (1989), hundreds of individual condominium units have been transferred or sold thereby creating a substantial risk of the removal of controlled rental housing units from the rental market.

(d) In order to regulate such removals effectively, it is necessary to regulate the sale of condominium units by the owners of rent controlled buildings, for the reasons

stated in the Report of the Cambridge City Council Committee on Rent Control dated May 28, 1981.

(e) In order to regulate such removals effectively, it is also necessary for the City of Cambridge to have the additional powers conferred by Section 3 of this Act.

SECTION 2. In the City of Cambridge, no owner of a building for which a condominium master deed has been recorded shall, directly or indirectly, sell, offer for sale, or agree to sell any controlled rental unit therein, unless the board has granted a removal permit for that unit, or unless the sale or offer is to, or the agreement is with, a current tenant of the unit who holds an exemption certificate. The board shall issue an exemption certificate to any person who files with it an affidavit in a form prescribed by the board, stating that he is a current tenant of the unit, that he occupied it as a tenant before August 10, 1979, and that he intends in good faith to occupy it indefinitely as its owner. Nothing in this act shall prevent an owner of a building or any portion thereof from conveying his entire interest in the building in good faith to one purchaser, who shall then be subject to the provisions of this act to the same extent as the original owner.

SECTION 3. (a) Notwithstanding the provisions of any general or special law to the contrary, including without limitation, the provisions of General Laws chapters one hundred and fifty-six B, one hundred and fifty-seven, and one hundred and eighty-three A, the City of Cambridge may, by ordinance, further regulate and control the removal of controlled rental units from the rental housing market, the reduction in the total number of controlled rental units in a building, structure or part

thereof, or the change in form of ownership of a building, structure or part thereof containing controlled rental units. Such regulations and controls may include, but are not limited to, the authority to:

(i) require that no person shall remove a controlled rental unit from rental housing use without first obtaining a removal permit from the rent control board. Such permit may be subject to terms and conditions not inconsistent with the purposes and provisions of this act;

(ii) require that no person shall convert a controlled rental unit to a condominium or cooperative without first obtaining a removal permit for that purpose from the rent control board. "Convert" shall include recording a master deed pursuant to the provisions of chapter one hundred and eighty-three A of the General Laws or filing articles of organization pursuant to chapters one hundred and fifty-six B or one hundred and fifty-seven of the General Laws, or advertising, offering for sale or selling a unit as a condominium or cooperative unit.

(iii) regulate evictions relating to the conversion of a controlled rental unit to a condominium or to a cooperative subject to such terms and conditions not inconsistent with the purposes and provisions of this act.

(b) Any hearings regarding matters related to removal permits or evictions shall be conducted by the board in accordance with the provisions of section five of Chapter 36 of the Acts of 1976, as amended.

SECTION 4. Section 9(a) of Chapter 36 of the Acts of 1976 is hereby amended by deleting subsection (8) thereof and by substituting the following:

(8) the landlord seeks to recover possession in good faith for use and occupancy of himself, or his children, parents, brother, sister, father-in-law, mother-in-law, son-in-law, or daughter-in-law; except that no action shall be brought under this clause to recover possession from a tenant who is sixty years of age or older and who occupied the unit continuously since before the recording of the master deed, or to recover possession of a condominium unit subject to chapter 8.44 of the Cambridge Municipal Code.

SECTION 5. Violation of any provision of this act, or of any ordinance or regulation adopted hereunder, shall constitute a violation of Chapter 36 of the Acts of 1976, as amended. In addition, the board or any person aggrieved by a violation of this act or any such ordinance or regulation may enforce its provisions in a civil action for damages or for declaratory or injunctive relief.

SECTION 6. The City of Cambridge may adopt ordinances, and the board may adopt regulations, to carry out the purposes of this act.

SECTION 7. Any person who is aggrieved by any action, regulation or order of the board may appeal or file a complaint pursuant to Section 10 of Chapter 36 of the Acts of 1976, as amended, unless otherwise defined in this act.

SECTION 8. The provisions of this act shall not apply to any building containing six or fewer units that has been occupied continuously, from on and after January 1, 1970 until January 1, 1990, by the owner of record as of January 1, 1970 or a member of that owner of record's family provided that any one family in the City

of Cambridge may obtain this exemption for only one building and provided that any family seeking to avail itself of this exemption swears by affidavit, under oath, that it owns or has a beneficial interest in only one building containing rent controlled units in the City of Cambridge.

For the purposes of this section, "owner of record" shall mean any owner as of January 1, 1970 named on the deed recorded at the Middlesex Registry of Deeds for the building for which this exemption is sought provided that the owner of record is an individual and not a corporate, trust or other business entity. This exemption shall not be available to corporations, trusts or other business entities.

For the purposes of this section, "family" shall mean an individual, an individual's spouse, parents, children, brother, sister, grandchildren, great grandchildren, father-in-law, mother-in-law, brother-in-law, sister-in-law, son-in-law or daughter-in-law.

For the purposes of this section, "continuous occupancy" shall mean the continuous physical residence by the owner of record as of January 1, 1970 or a family member of that owner of record of the building from on and after January 1, 1970 until January 1, 1990. The exemption shall not apply to any building that was not occupied by the owner of record as of January 1, 1970 or a family member of that owner of record for a period of more than twelve months, in the aggregate, between January 1, 1970 and January 1, 1990; and, in no event, shall the exemption apply to any building that remained unoccupied by the owner of record as of January 1, 1970 or a

family member for any period of time where a tenant broke the chain of continued occupancy by the owner of record or a family member.

SECTION 9. The City of Cambridge, in consultation with organizations representing owners of rent controlled properties in Cambridge, rent controlled tenants and other interested parties, shall examine and consider the following rent control issues, particularly as they affect so-called small owners of rent controlled properties in Cambridge: (1) whether the capital improvement rent adjustment procedure, set forth in regulation 75 of the Cambridge Rent Board, operates fairly; (2) whether the fair base rent formula, set forth in regulation 75-02 of the Cambridge Rent Board, should be updated to provide for new minimum rents; (3) whether, under what circumstances and to what degree, owners of rent controlled properties should be allowed to pass along increases in property taxes, water and sewer fees and pass along increases in property insurance costs to tenants; (4) whether the allowable management fee for owners-occupiers of rent controlled properties should be increased; (5) whether prospective employees and hearing officers of the Cambridge Rent Control Board should be prohibited from owning or leasing rent controlled property in the City of Cambridge. The City of Cambridge shall examine and consider these issues and any other issues it deems relevant to the administration and enforcement of rent control, particularly as relates to the availability of decent and affordable housing for low and moderate income tenants and the problems experienced by so-called small property owners of rent controlled property who owner-occupy their property and are not actively

engaged in the business of owning and renting property; and shall make findings of fact and prepare recommendations, based upon the findings, and transmit both the findings and the recommendations to the Joint Committee On Local Affairs, not later than July 1, 1991.

SECTION 10. If any section or any provision of any section of this act or the application of such section or any such provision of any such section to any person or circumstance shall be held invalid, the validity of the remainder of the act and the applicability of such section or such provision of such section to other persons or circumstances shall not be affected thereby; provided also that nothing herein shall be construed to limit the authority of the city and the rent control board to regulate removal of controlled rental units as previously judicially determined.

SECTION 11. This act shall take effect upon its passage.

Approved June 6, 1990